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THOMPSONS SOLICITORS

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Strikers who were sacked while others were selectively re-employed following industrial action are entitled to full compensation for their claims for unfair dismissal the House of Lords has ruled. It ruled that the Industrial Tribunal was not entitled to make a deduction from the compensation because of the individual strikers involvement in the Industrial action.

The House of Lords also held that as there had been collective action and because everyone was dismissed it was impossible to allocate blame for the industrial action to any individual striker.

The case arose when Crosville Wales Ltd dismissed 119 bus drivers who had taken part in a walkout in support of union branch officers who had been disciplined. 22 of the drivers were subsequently re-employed and 73 drivers made complaints of unfair dismissal.

The drivers had not been re-engaged because the employers had taken the decision only to advertise their jobs through the media and the Job Centre rather than direct offers to the individuals.

The difficulties for the employers arose from the wording of what is now Section 239 of the Trade Union and Labour Relations Consolidation Act 1992). This provides that in selective re-engagement cases the reason for dismissal is the reason they were not taken back, not the reason they were originally dismissed.

The result of this was that each and every one of the strikers was entitled to full compensation for their claims for unfair dismissal. The House of Lords did not like this outcome and called for the law to be re-considered by the Law Commission.

Such a move would involve the courts assessing the merits of industrial disputes to decide the rights of individual strikers: a controversial step.

Thompsons on-line

Thompsons has launched its own website on the Internet full of useful information about rights at work and what to do following an accident. This is an alternative or a complement to the printed papers versions of our publications.

All of our publications are now available on-line for those with Internet access. You can either print selected items on your own printer or download the documents on to your own PC.

There is a Labour and European Law Review Library which is indexed and cross referenced for ease of use. Simply select a topic and the website will call up all articles on that subject that have appeared in any issue of the LELR.

The site also contains all our brief guides on: accidents at work, asbestos, road traffic accidents, spinal injuries, medical negligence, dismissals and the Disability Discrimination Act.

Our more detailed publications on Race Discrimination, Sex Discrimination, Trade Unions and the law and Part-Time Workers (produced in association with the TUC) are also on the website.
The address is simple:
http://www.thompsons.law.co.uk

Happy surfing.

Rights for trans-sexuals

Chessington World of Adventures Ltd v Reed [1997] IRLR 556 EAT

Private sector employees are now protected against discrimination on the ground of trans-sexuality (gender reassignment) following a new ruling by the Employment Appeal Tribunal based on the Equal Treatment Directive. Once again European law offers protection to UK employees not explicitly available under domestic legislation.

Since P v S and Cornwall County Council [1997] IRLR 347, public sector employees who face discrimination based on gender reassignment (trans-sexuality) have been protected by the Equal Treatment Directive. Public sector workers can directly enforce a Directive while private sector workers have to wait for the UK domestic legislation which brings the directive into effect.

In Chessington the EAT construed the Sex Discrimination Act 1975 in line with the decision in P v S effectively extending this protection to private sector workers.

Ms Reed is a biological male who worked for Chessington World of Adventures as a rides technician. Four years after she started work she announced her change of gender identity from male to female.

She then suffered prolonged and serious harassment by her colleagues. Her tools and mugs were repeatedly stolen; work mates refused to work with or assist her; her car and motorbike were tampered with; and she was verbally abused by workmates.

The harassment started in 1991 and went on until she went off work sick in March 1994. She was dismissed on the grounds of incapability in July 1994.

Management became aware of the difficulties Ms Reed was facing from February 1992. Despite her complaints and request for a transfer no help was forthcoming from management. Nor was any disciplinary action taken to identify and discipline those responsible for the harassment.

Ms Reed took her complaint of sex discrimination to an Industrial Tribunal and was successful. Chessington World of Adventures appealed.

The EAT decided that discrimination arising from an intention to undergo gender reassignment falls within the Sex Discrimination Act 1975. It therefore interpreted the domestic legislation of the Sex Discrimination Act in line with the European Court of Justice decision in P v S that discrimination for a reason related to gender reassignment is contrary to the Equal Treatment Directive.

> Once again European law offers protection to UK employees not explicitly available under domestic legislation

The EAT went on to say that where the reason for the unfavourable treatment is sex based, here a declared intention to undergo gender reassignment, there is no requirement for a male/female comparison to be made.

This means that discrimination on the basis of gender reassignment should be treated in the same way as discrimination on the grounds of pregnancy (Webb v EMO) as discrimination in itself without needing to look at how someone else would have been treated.

The decision in Reed has wide significance for private sector employees providing protection against discrimination on the basis of their trans-sexuality, protection which has been available for public sector employees since the decision in P v S last year.

We now await the decision from the European Court of Justice in Grant v South West Trains (LELR Issue 15). If the ECJ follows the Advocate General's view that discrimination on the basis of sexual orientation is based essentially - if not exclusively - on the sex of the person concerned, then Reed can be used to argue that the Sex Discrimination Act can also cover discrimination on the grounds of sexuality for private sector employees, without waiting for Government business managers to find parliamentary time for domestic legislation to put the Equal Treatment Directive in force for private sector workers.

Indirect dis

Gerster v Freistaat Bayern ECJ 2/10/97
Case C-1/95
Kording v Senator fur Finanzen ECJ 2/10/97
Case C-100/95
Falkirk Council & Others v Whyte and Others
[1997] IRLR 560

The European Court of Justice has once again considered indirect discrimination and part time workers rights in two important cases. In so doing they have called into question a fairly wide spread practice in relation to part timers and have reiterated the stringent standard of the objective justification test.

And in the UK the Employment Appeal Tribunal has approved a more liberal interpretation of our own indirect discrimination test under Section 1(1)(b) of the Sex Discrimination Act 1975 and the meaning of the application of a requirement or condition.

Mrs Gerster works for the Bavarian Civil Service in finance administration. Civil Service Regulations set out the rules relating to promotion which are based on merit plus length of service.

Candidates need a minimum period of service to be eligible for promotion: once that is acquired their merit can be assessed. However different rules apply for part timers.

Periods of employment of fewer than half of the normal working hours for the post in question are not taken into account for the purpose of calculating length of service; periods during which the hours worked are at least half of normal working hours count at a rate of two thirds; and periods worked in excess of two thirds of normal working hours are deemed equivalent to periods of full time employment.

It was agreed by the Bavarian Civil Service that the provision treated part time employees less favourably than full time workers as part timers accrued length of service more slowly and therefore opportunities for promotion took longer. Mrs Gerster was affected, being turned down for promotion because she did not have enough qualifying service based on her part time hours.

80% of the part time workers in Mrs Gerster's department were women and the ECJ upheld a complaint that the practice could be in breach of the Equal Treatment Directive 76/207. The Equal Treatment Directive asserts that "the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly". The Regulations indirectly discriminated against women, the ECJ held and would be unlawful unless they could be objectively justified.

The practice was an equal treatment issue, not an equal pay issue- and therefore not covered by Article 119 of the Treaty of Rome or the Equal Pay Directive.

The judgment analyses the dividing line between pay and treatment issues. Where a Civil Servant is placed on the list of candidates eligible for promotion the progression to a higher grade and therefore more pay was not a right but a 'mere possibility', as actual promotion depended on a number of factors. The issue was primarily access to career advancement and only indirectly linked to the pay that Mrs Gerster would have got had she been promoted.

Contrast the Gerster situation with the earlier case of Nimz 1991 [IRLR] 222 in the ECJ. In Mrs Nimz's case full time employees were upgraded after six years, whilst part timers had to wait for 12 years, but with the length of service promotion was 'practically automatic' and therefore directly concerned pay rather than access to opportunities. Mrs Nimz's case succeded as an equal pay case.

The Gerster case is a helpful reminder that it is usually best to put a case on both grounds - equal pay and equal treatment to avoid a gap and prevent any later time limit problems where the position is at all unclear.

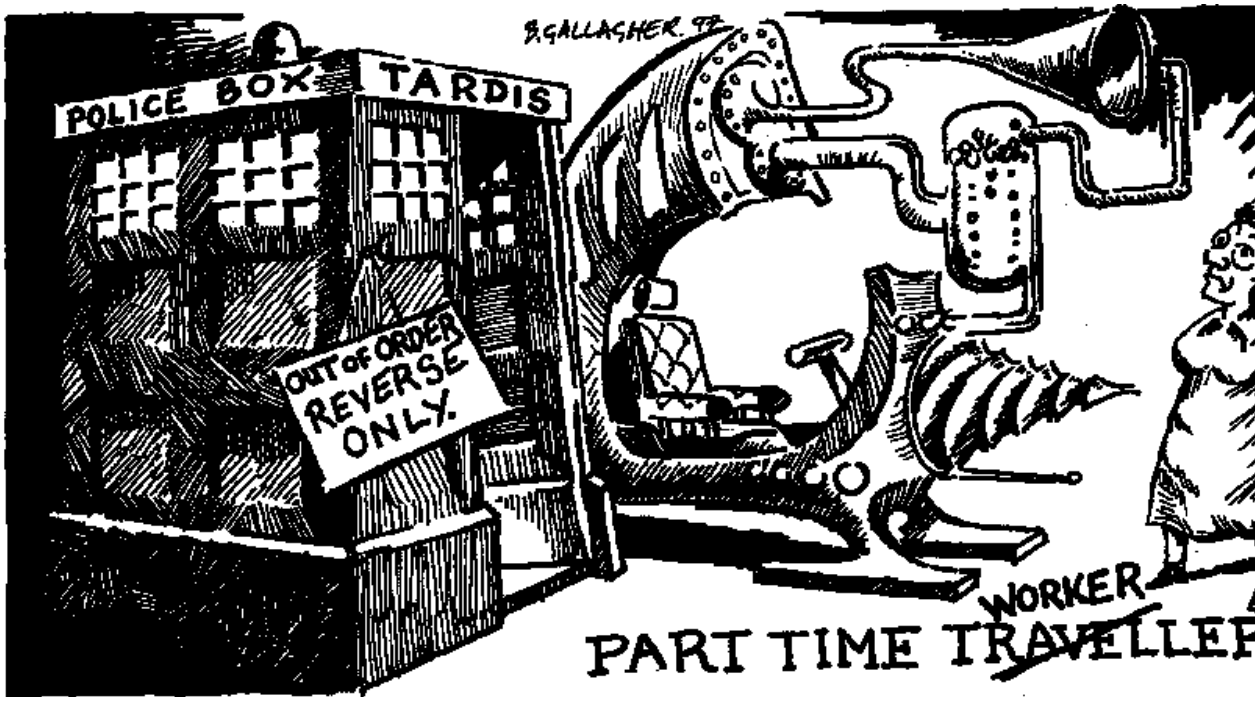
As usual the ECJ have left the consideration of objective justification to the national courts. But in restating the objective justification test they have reiterated the need for hard evidence from the employer.

In this case the Bavarian Civil Service could not identify objective criteria unrelated to any discrimination on the basis of an alleged special link between length of service and acquisition of a certain level of knowledge or experience. They were making generalisations concerning certain categories of worker yet objectivity of a service requirement will depend on all the circumstances in each individual case.

Different employees will perform differently and the extent to which length of service and experience will enable a worker to improve work performance will vary from employee to employee.

The objective justification test applied to this case would mean the employer will need to prove that part time employees are generally slower than full time ones in acquiring job related abilities and skills, and that the extra service requirement reflected a legitimate policy aim; was an appropriate means of achieving that aim and was neces-

crimination



sary in achieving it. The national court would have to find a special link between hours of service and acquisition of a certain level of knowledge or experience for the practice to be objectively justified.

In the second part time workers case considered by the ECJ, Mrs Kording was seeking to challenge a requirement of full time service for 15 years in order to practice as a tax advisor without having to take the qualifying examination. Exemptions from the examination are granted automatically to case officers in the executive grade of the revenue administration with 15 years' full time service. Part time service was calculated on a pro rata basis extending the length of service requirement.

The ECJ stated that the pro rata reduction of Mrs Kording's service could be discriminatory. 92.4% of part time executive grade officers in the revenue administration were female and so the national measure worked to the disadvantage of far more women than men. It would be unlawful unless it could be objectively justified and any alleged link between hours of work and levels of experience must be proved, and not assumed.

Again the case has been remitted to the German national courts for consideration.

The United Kingdom test for indirect discrimination in Section 1 (1)(b) of the Sex Discrimination Act 1975 is far more prescriptive than the general wording of the Equal Treatment Directive. A particular problem has been the need to prove that an employer has applied a condition or requirement in order to argue indirect discrimination.

This was expressed as 'an absolute bar' in Perera v The Civil Service Commission [1983] IRLR 186 and this relatively early Court of Appeal judgment has been followed ever since. It has meant that where practices have a discriminatory outcome employers can escape liability if the practice stops short of a requirement or condition in the sense of an absolute must.

But that may all now have changed following the case of Falkirk Council v Whyte & Others where the EAT has upheld an Industrial Tribunal's liberal interpretation of the phrase. A factor in the selection process for a managerial post at Cortonvale Prison discriminated against women even though it was only stated to be 'desirable'.

The EAT ruled that it was clear in practice in the way in which the interview panel operated that the indirectly discriminatory factor was decisive in the selection process. It therefore came within the definition of requirement or condition applying a liberal interpretation under the wide approach of community law to sex discrimination.

We shall have to wait and see whether ITs and the higher courts will adopt this more common sense approach, or whether Falkirk v Whyte will be a case that turns on the particular findings of fact by the IT. In the meantime it is a welcome advance which helps to marry up the Equal Treatment Directive with the Sex Discrimination Act.

Hitting the two year hurdle

Morris v Walsh Western UK Limited [1997] IRLR 562 (EAT)
Clark & Tokeley Limited v Oakes [1997] IRLR 564 (EAT)

Continuity of employment remains important for employees. Many benefits depend on length of service. These may be statutory entitlements - such as the right to claim unfair dismissal or a redundancy payment - or contractual entitlements such as holiday or the amount of severance payments.

Often the issue of continuity arises where there is a change of employer. This will usually lead to a break in continuity unless there has been a transfer of a business, or the new employer is part of the same group of companies as the old employer.

A month's break

Continuity of employment may be an issue even where there has been no change of employer. That was the situation facing Mr Morris who was dismissed, re-employed one month later and told to treat the intervening period as unpaid leave.

Despite this, the Industrial Tribunal and the Employment Appeal Tribunal both concluded that his service had been broken. This prevented him from bringing a claim for unfair dismissal only a few months after he had resumed work.

The EAT decision has a slightly unusual feature in that neither party turned up to argue the case, although Mr Morris made written representations. The EAT had to decide whether his re-employment meant that he had been absent from work through a custom or arrangement which meant his employment should be treated as continuing.

This arrangement or custom must be in place before the absence takes place. This EAT said that the arrangement after the event to treat the absence as unpaid leave was not enough. It also rejected the argument that Mr Morris should be treated as though he had been unfairly dismissed at the start of the absence, would have applied to an IT but had effectively been reinstated so continuity should be preserved.

Mr Oakes was dismissed by a liquidator one week before they sold a business which was in voluntary liquidation

This has important practical consequences for employees. If they are dismissed, but their employer re-employs them without full reinstatement and payment for the period of absence, they should consider an unfair dismissal claim for the original dismissal.

This may prompt the employer to argue or accept that there has been no effective dismissal and no break in continuity. If not, it enables the employee to complain of the unfairness of the original dismissal and obtain redress for any loss of statutory or contractual rights which has resulted.

Transfer of business

Most recent decisions on continuity have concerned a change of employer, where the UK legislation complements, but neither derives from nor replicates, the Acquired Rights Directive and Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE).

Mr Oakes was dismissed by a liquidator one week before they sold a business which was in voluntary liquidation. Other insolvency practitioners were also involved and at the request of a receiver Mr Oakes continued to attend work, unpaid, to carry on the business which was in the process of transfer.

He was taken into employment by the new owners of the business

on the day it was sold. They then dismissed him less than 2 weeks later.

The positive part of the EAT's judgment, from an employee's perspective, was that Mr Oakes was to be treated as employed in the business "at the time of the transfer".

This is not confined to the moment in time at which the agreement on transfer is signed, but can be spread over a longer period over which the process of transfer takes place. Mr Oakes dismissal took place during the course of this process and consequently his continuity was preserved.

This very helpfully avoids the narrow approach adopted by the EAT in Longden v Ferrari [1994] IRLR 157 when considering the TUPE Regulations in similar circumstances. The EAT in Oakes makes the distinction that TUPE refers to the date on which the transfer was "effected", which meant its completion rather than the process of transfer.

This means that employees who are taken on by the new employer are in a better position to argue continuity than employees who argue that they should have been taken on under TUPE, but have not been re-employed.

This distinction seems artificial and unjustified, particularly when one remembers that TUPE is based on a European Directive designed to safeguard employee rights. Bearing in mind that TUPE specifies that a transfer may take place over one or more transactions, an employee who is employed at the start of that process should be protected, not merely only employees who are employed when the first transaction is completed.

The current interpretation of TUPE on this point is an encouragement to employers to attempt to evade TUPE by dismissing before the transaction is concluded. It is contrary to the policy of TUPE to exclude protection in those circumstances.

The employee's protection should not depend on the difficult task of establishing that the dismissal was unfair and invalid because it was connected to the transfer to the new owner.

Injured at work, punished by justice

The Government wants to put in place law reforms that will rob injury victims of some or all of their compensation and make life cheaper for those who cause injury. It wouldn't be a good idea at any time but with injuries and deaths at work rising sharply it now looks positively dangerous.

Is it because the Government has to make tough choices about how it spends our money? No – the changes will not save the Government a single penny.

You may have missed this great new initiative – it is part of the Government's Access to Justice policy. Cut through the political spin and you find a policy that will deny justice to many injury victims, make it more expensive for others, but cheaper for those who cause injury.

At the moment there is an easy to understand principle: loser pays all, including lawyer's costs. In accident claims – where the bill will always be paid by an insurance company - this means that the person who causes the accident pays all the costs associated with it.

The Government wants to end this and limit the legal expenses the injured person, or whoever supports them, can recover from the losing insurance company. How has this happened?

The Tory Government supported plans put forward by Master of the Rolls Lord Woolf to streamline civil justice and "fix" legal costs. Lord Woolf made many useful recommendations but on fixed costs he got it wrong.

Taking on an insurance company is an uneven battle. In real life an injured person with few resources and everything to prove sues an insurance company with limitless resources.

In their television adverts the insurance companies just can't wait to get that cheque in the post. The reality in personal injury cases is that they deny, delay and frustrate claims in the hope that the injured person will give up or accept lower compensation.

The injured person runs up costs in dealing with these tactics but, at the moment they can do so safe in the knowledge that they will recover these costs when they win. In future they won't.

This will put pressure on the injured person to settle a claim for less than it is worth or abandon it altogether because the cost of taking the claim will outweigh what they will get back. And the vast majority of cases which are fought by injured people are won.

Insurance companies are the one group who will gain by these proposals. They welcome the move because they stand to make millions by not having to pay the full legal costs of the injured person.

This will make an unequal battle even more unequal. The insurance company will still spend, as they do now, thousands of pounds defending and defeating claims.

The money saved with "fixed" costs will mean insurance companies have even more to spend doing so. And that means more injured people losing out.

Why should these changes bother unions? Last year the Legal Aid Board helped only 30,000 people injured at work or on the roads.

Trade unions helped 150,000 people and recovered £330 million in compensation at no cost to the taxpayer. In fact the Department of Social Security will recover £179.9 in this financial year alone in DSS benefits recovered from negligent employers thanks to trade union legal schemes.

The simple fact is that trade unions are the biggest providers of legal services to injured people so they have most to lose in terms of legal costs they will no longer be able to recover. The proposed changes will mean insurers will no longer have to pay £25 million a year in legal costs to unions who win claims on behalf of members.

It sounds like the sort of thing the last Tory Government thought up and which should have been ditched by the new Labour Government. That's because it is.

Trade Unions are the biggest providers of legal services to injured people

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